

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY LEE SICKELS,

Defendant-Appellant.

UNPUBLISHED

May 29, 2003

No. 234746

Calhoun Circuit Court

LC No. 00-004653-FH

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of burning a dwelling house, MCL 750.72, for which he was sentenced as a second habitual offender, MCL 769.11, to 100 to 240 months' imprisonment. We affirm.

I. FACTS

This incident arose from a dispute between defendant and his former girlfriend and mother of his daughter, Michelle Hall. Hall testified that she and defendant had a three year relationship and had a daughter together. They broke up around 1998 and defendant was granted supervised visitation with the daughter. Hall admitted that she had avoided defendant for several scheduled visits and he had not been allowed to visit his daughter since August 13, 2000. Hall testified that around 9:10 a.m. on Sunday, September 10, 2000, she decided to take her daughter shopping and left her house.

Defendant's father drove defendant to Hall's house at 11:00 a.m. that Sunday so he could pick up his daughter for a visit. According to Michigan State Police Sergeant Kenneth Hersha, who was assigned to the Fire Marshall Division, defendant told him he arrived at Hall's house at 11:00 a.m. to pick up his daughter. Defendant told him he knocked on the front and back doors. When he got no response, he pulled out his lighter and lit the papers in a trash can on the enclosed porch.

The kitchen and back porch of the house were heavily damaged by fire and there was smoke damage throughout the house. Hall's dog who was left in the kitchen was killed by the fire. Police determined that the fire was intentionally caused by lighting papers in the trash container on the porch. Defendant confessed to police that he had started the fire in the trash can. Defendant also gave a written confession.

II. JURY INSTRUCTIONS

Defendant first argues that the trial court erred by not giving a jury instruction on the offense of burning of personal property, MCL 750.74, which defendant claims is a lesser included offense of burning a dwelling house, MCL 750.72. We disagree.

A. Standard of Review

We review de novo claims of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). “[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).¹

B. Analysis

By its language, MCL 750.72 requires the property burned to be either (a) a dwelling, (b) the contents of a dwelling, or (c) a building within the curtilage of a dwelling. In contrast, burning of personal property, MCL 750.74, refers only to property not defined by MCL 750.72 or MCL 750.73. MCL 750.74 is not a necessarily included lesser offense of MCL 750.72, because defendant could have committed the greater offense without first committing the lesser offense. *Cornell, supra* at 345.

III. MALICE

Defendant next argues he had no intent to burn the house. MCL 750.72 requires a wilful or malicious act, and a wilful disregard of the likelihood that one’s actions may create a very high risk of arson – as shown here – is proof of malice. *People v Nowack*, 462 Mich 392, 410; 614 NW2d 78 (2000). Therefore, the prosecutor was not required to prove defendant specifically intended to burn the dwelling.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next claims ineffective assistance of counsel where counsel failed to object at the preliminary examination to the admission of defendant’s confession before the prosecutor established corpus delicti. Consequently, defendant argues, defense counsel lost the motion to quash because he did not effectively prevent defendant’s confession from being admitted. We disagree.

A. Standard of Review

¹ “Our decision in this case is to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved.” *People v Cornell*, 466 Mich 335, 367; 646 NW2d 127 (2002). An appeal had been filed in the case at hand when *Cornell, supra*, was decided.

Appellate review of an ineffective assistance of counsel claim involves a mixed question of fact and constitutional law. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and constitutional questions de novo. *Id.* at 579. However, because this issue was not preserved, appellate review is limited to "mistakes apparent on the record." *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, a defendant must show counsel's performance fell below an objective standard of reasonableness, and defendant was denied a fair trial from the resulting prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

B. Analysis

Corpus delicti requires independent evidence establishing (a) the occurrence of the injury, and (b) criminal agency in connection with the source of the injury, before a defendant's confession may be admitted. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). Reasonable inferences may be drawn from circumstantial evidence. *Nowack, supra*, 462 Mich at 401-402. Criminal agency is shown by the absence of circumstances indicating that a fire resulted from an accidental cause. *Nowack, supra* at 402-403. Furthermore, to prove criminal intent, the prosecutor need not show an offense was committed by a particular person – proof that *someone* committed an offense is sufficient to establish criminal agency. *Konrad, supra* at 270.

The prosecutor presented sufficient evidence establishing that an injury occurred – the burning of a dwelling – and that it was caused by a criminal act, before offering evidence of defendant's confession. Therefore, defense counsel's failure to raise a futile objection was not unreasonable. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defense counsel filed a motion to quash the burning of a dwelling charge after the preliminary examination. Although the trial court denied the motion, counsel's argument was trial strategy. Even where counsel was mistaken regarding matters of trial strategy, we will not assess competence using hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843, (1999). Furthermore, unfavorable rulings of the court do not amount to ineffective assistance of counsel where – as here – the record showed counsel zealously advocated his client's interests. *People v Washington*, 251 Mich App 520, 530-531; 650 NW2d 708 (2002).

Defendant next argues that he was denied effective assistance of counsel by counsel's failure to object when defendant's statement was admitted at trial. He claims admission of his confession caused him to suffer unfair prejudice. We disagree.

All evidence is prejudicial to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Defendant must show that this prejudice caused the trial proceedings to be fundamentally unfair. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). In addition to proving a crime occurred, the prosecutor showed that defendant and the victim had an acrimonious relationship, the victim expected defendant to arrive at the house on the day of the fire, and defendant arrived shortly before the fire started. Defendant was placed at the scene shortly before the crime occurred, and there was enough circumstantial evidence on the record to admit the confession over an objection. Therefore, counsel's alleged failure to object did not render the proceedings fundamentally unfair.

V. OFFENSE VARIABLE 10

Defendant last argues that the trial court abused its discretion by attributing ten points to OV 10 for exploitation of a vulnerable victim merely because defendant had previously been involved in a domestic relationship with the victim. Defendant claims there was no evidence that defendant had manipulated the victim for selfish or unethical purposes. We disagree. Regardless, deducting these ten points from the scoring would not change the recommended sentence range. Therefore, any error was harmless.

Affirmed.

/s/ Richard A. Bandstra

/s/ Hilda R. Gage

/s/ Bill Schuette